No. 02-1547

In the Supreme Court of the United States

KIP R. RAMSEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a member of the Yakama Indian Tribe who hauls logs on public highways using diesel trucks is exempt from federal highway use and diesel fuel excise taxes under the provisions of the 1855 treaty between the United States and the Yakama Tribe.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 302 F.3d 1074. The opinion of the district court (Pet. App. 12a-26a) is reported at 134 F. Supp. 2d 1203.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2002. The petition for rehearing was denied on December 23, 2002. Pet. App. 28a. On March 17, 2003, Justice O'Connor extended the time in which to file a petition for a writ of certiorari to and including April 22, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

Article 3 of the Treaty of June 9, 1855, between the United States and the Confederated Tribes and Bands of the Yakama Indian Nation, 12 Stat. 952-953, is set forth at Pet. App. 38a.

STATEMENT

1. Petitioner Kip R. Ramsey is a member of the Confederated Tribes and Bands of the Yakama Indian Nation. In his business, he uses large trucks to haul logs from logging areas within the Yakama reservation to off-reservation mill sites. These trucks weigh over 55,000 pounds each. They run on diesel fuel and travel on public highways. Pet. App. 3a, 13a.

2. Section 4481 of the Internal Revenue Code imposes an annual highway use tax on motor vehicles that have a gross taxable weight of 55,000 pounds or more. 26 U.S.C. 4481. For vehicles that weigh between 55,000 and 75,000 pounds, the highway use tax is $100 per year plus $22 for each 1000 pounds in excess of 55,000 pounds. For vehicles that weigh more than 75,000 pounds, the highway use tax is $550 per year. 26 U.S.C. 4481(a).[1]

During the years involved in this case, a federal excise tax was imposed on sales of diesel fuel used by highway vehicles. The rate of that tax varied over time. During the last two years of the relevant period, the diesel fuel excise tax was 24.3 cents per gallon. 26 U.S.C. 4081(a)(2)(ii) (1994).[2]

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[1] The federal highway use tax is reduced by 25% for trucks that are used exclusively in transporting logs and other harvested forest products. 26 U.S.C. 4483(e).

[2] The federal excise tax on diesel fuel was located in various provisions of the Code over the relevant years. The tax was set forth in Section 4041 of the Code prior to April 1, 1988, in Section

3. a. Petitioner failed to pay the federal highway use and diesel fuel taxes for the years 1986-1995. When the Commissioner of Internal Revenue assessed petitioner for $460,702 in taxes, penalties, and interest, petitioner paid the assessment and brought this suit for refund. Pet. App. 3a, 14a.[3] In this suit, petitioner alleges that he is exempt from these federal taxes under Article 3, paragraph 1 of the Treaty of June 9, 1855, between the United States and the Yakama Tribe (the 1855 treaty), 12 Stat. 951, 952-953 (1855). That treaty provides in pertinent part as follows (Pet. App. 38a):

> *And provided*, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

b. The district court upheld petitioner's claim that this portion of the 1855 treaty exempts him from the federal highway use and diesel fuel taxes. Pet. App. 24a-25a. In reaching that conclusion, the court applied the interpretation of this paragraph of the treaty that it had previously adopted in a suit brought by petitioner to challenge the imposition of highway use fees imposed by the State of Washington on petitioner's use of state roads. *Id.* at 21a-22a, 24a (citing *Yakama Indian Nation* v. *Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997),

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4091 of the Code from April 1, 1988, to December 31, 1993, and in Section 4081 beginning January 1, 1994.

[3] The companies that petitioner Ramsey owns and operates, and through which he conducts his business, joined in this suit. Pet. App. 12a.

aff'd *sub nom. Cree* v. *Flores*, 157 F.3d 762 (9th Cir. 1998)). In that earlier case, the district court stated that the "most critical" text of the treaty is "the language securing to the Yakamas the right to travel the public highways 'in common with' citizens of the territory." 955 F. Supp. at 1246. The court held in *Flores* that this treaty provision "unambiguously reserves to the Yakamas the right to travel the public highways without restriction for purposes of hauling goods to market." *Id.* at 1248.

In reaching that conclusion in *Flores*, the court recognized that the only discussion of "such commonly held rights" to use public roads during the treaty negotiations was the explanation of the government's representative that "You would have the benefit of [such roads] as well as the other people." 955 F. Supp. at 1246.[4] The court stated that, other than that single reference, this treaty language had not been discussed during the treaty negotiations. *Ibid.* But see note 4, *supra*. The court also recognized that, prior to 1980, neither the Tribe nor any of its members had claimed a right to travel the public highways free of state taxa-

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[4] In the negotiations that led to the 1855 treaty that secured for the Yakama the "right, in common with citizens of the United States, to travel upon all public highways" (Pet. App. 38a), the representative of the United States explained to the tribal representatives that "you will be permitted to travel the roads outside the Reservation. We have some kind of roads which perhaps you have never seen; we may wish to make one of the roads from the settlements east of the mountains to our settlements here * * * ." C.A. App. 71 (remarks of General Palmer). The government representative went on to say, "Now, as we give you the privilege of traveling over roads, we want the privilege of making and traveling roads through your country, but whatever roads we make through your country will not be for your injury." *Id.* at 72.

tion or regulation. 955 F. Supp. at 1254. The court nonetheless concluded that, in 1855, Yakama tribal members would have regarded the treaty language as providing them with a right to travel on off-reservation highways "without restriction"—a right that the court held was to "be exercised 'in common with' non-Indians. In other words, both Indians and non-Indians would use the public roads simultaneously." *Id.* at 1246, 1247.

In this federal tax case, petitioner moved for summary judgment based on the record and the holding of the state tax case in *Flores*. The United States also moved for summary judgment, arguing that the plain text of the treaty confers no exemption from federal taxation. The district court held that it "need not undertake the effort of construing Article III of the Yakama Treaty" in this case because the reasoning and holding of the prior state tax decision in the *Flores* case bars imposition of the federal highway use and diesel fuel taxes in this case. Pet. App. 21a.

4. The court of appeals reversed and remanded for entry of judgment in favor of the United States. Pet. App. 1a-11a. The court of appeals explained that the holding in *Flores* does not apply to this case because "different standards" govern determination of the existence of federal and state tax exemptions under national treaties. *Id.* at 7a. While "[t]he federal government has plenary and exclusive power to deal with tribes," a State's "authority over tribal members is limited by the tribal right of self-government and the preemptive effect of federal law. * * * For this reason, all citizens, including Indians, are subject to federal taxation unless expressly exempted, * * * while a state's authority is limited * * * ." *Ibid.*

The court noted that the United States must act expressly in surrendering the sovereign attribute of

taxing power, and that it has therefore consistently been held that "[t]he applicability of a federal tax to Indians depends on whether express exemptive language exists within the text of the statute or treaty." Pet. App. 8a. In determining whether such "express exemptive language" exists, the court explained that "[t]he language need not explicitly state that Indians are exempt from the specific tax at issue; it must only provide evidence of the federal government's intent to exempt Indians from taxation." *Ibid.*

The court found no such express exemptive language in the text of Article 3 of the 1855 treaty. The plain language of the treaty establishes for the Yakamas a "right, in common with citizens of the United States, to travel upon all public highways." Nothing in that text provides any exemption for the Yakamas from the general obligation of all other "citizens of the United States" who use public highways to pay taxes associated with such travel. Pet. App. 10a-11a. The court therefore held that petitioners are not exempt from the "generally applicable" federal highway use and diesel fuel taxes imposed by the United States. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. Recognizing the plenary authority of Congress to legislate over Indian affairs, this Court has made clear that generally applicable federal tax statutes apply to Indians, as they do other citizens, without the necessity for any explicit language to that effect. *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418, 419-420 (1935); *Squire* v. *Capoe-*

man, 351 U.S. 1, 6 (1956) ("in the ordinary affairs of life, not governed by treaties or remedial legislation, [Indians] are subject to the payment of income taxes as are other citizens"). And, in addressing claims of Indians to exemptions from such generally applicable federal taxes, this Court has consistently applied the bedrock principle that exemptions from federal taxation must be expressly stated and may not be based merely on inference. There is a "settled principle that exemptions from taxation are not to be implied; they must be unambiguously proved." *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 354 (1988); see *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60 (1939) ("Exemptions from taxation do not rest upon implication."). In cases that address claims by Indians of exemption from federal taxation, this Court has consistently held that "[t]he intent to exclude must be definitely expressed." *Choteau* v. *Burnet*, 283 U.S. 691, 696-697 (1931). See also *Squire* v. *Capoeman*, 351 U.S. at 6 ("to be valid, exemptions to tax laws should be clearly expressed"); *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. at 420 (same).

The Court has thus "repeatedly said that tax exemptions are not granted by implication [and it] has applied that rule to taxing acts affecting Indians as to all others." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 156 (1973) (quoting *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 606-607 (1943)). See *Choteau* v. *Burnet*, 283 U.S. at 693-694 (Indian liable for federal income tax because the statute did not "expressly exempt" him). Recognizing the preeminent role of Congress both in taxation and in the regulation of Indian affairs, the Court has held that tax exemptions for Indians should not be implied because, if an exemption had been intended, it "would doubtless have

been expressed." *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620 (1870).

b. In view of these established principles, petitioner has not asserted that the generally applicable federal highway use and diesel fuel taxes themselves provide any exemption for the Yakama or other Indians. The broad text of these provisions makes clear that no such contention could be maintained. See 26 U.S.C. 4041, 4081, 4091, 4481.

Instead, petitioner relies solely on Article 3, paragraph 1, of the 1855 treaty, which he claims "clearly expresses a tax exemption" (Pet. 8) for Yakama travel on the public highways of the United States. The plain text of that provision, however, expressly secures to the Yakama only "the right, in common with citizens of the United States, to travel upon all public highways." Pet. App. 38a. As the court of appeals correctly held in this case (*Id.* at 10a–11a), a right in common with other citizens to travel on highways does not expressly exempt the Yakama from "generally applicable" taxes.

Petitioner seeks to avoid the conclusion required by the plain text of the treaty by repositioning its language and arguing that it provides "him the right 'to travel the public highways' 'in common with citizens of the United States' free of taxes and fees." Pet. 8. Having recast and altered the text of the treaty in this manner, petitioner asserts that it "clearly expresses a tax exemption." *Ibid.*

The plain text of the treaty, however, does not state what petitioner claims. The treaty does *not* refer to taxation at all; nor does it refer (as petitioner suggests) to a "right to travel . . . public highways" (Pet. 8, 9, 12, 14, 17-22, 25, 27, 28). It refers instead to a "right, in common with citizens of the United States, to travel upon all public highways" (Pet. App. 39). It is thus the

right itself (not merely the travel) that is shared "in common" under the treaty. In providing the Yakama a right "in common with citizens of the United States," the treaty *expressly* gives the Yakama a right equal to, not superior to, the right of other citizens to travel on public highways. See note 4, *supra*.

Moreover, it is obvious that the actual language of this portion of the treaty is perfectly silent with respect to taxation. The treaty text in no sense provides any "exemption" from taxes, much less an "express exemption."

Other provisions of the 1855 treaty reflect the same understanding that no tax exemption for travel on public highways was intended. The treaty provides two separate and different rights to the Yakamas under the first paragraph of Article 3. The first is a "right of way, with *free access* from [the reservation] to the nearest public highway"; the second is a "right, in common with the citizens of the United States, to travel upon all public highways." Pet. App. 38a (emphasis added). As the court of appeals emphasized in its decision in this case, "free access" to highways is guaranteed only *on* the reservation and between it and the nearest public highway. *Id.* at 10a-11a:

> "Free access," however, does not modify the right to travel upon the public roadways. Indeed, the clause granting the Yakama the "right, in common with citizens of the United States, to travel upon all public highways" contains no exemptive language. "In common with" does not express an intent to exempt the Yakama from taxes.

In short, while petitioner claims that the treaty gave the Yakamas a right superior to that of "the citizens of the United States" with respect to the use of public

highways off the reservation (see Pet. i-ii, 4-5, 14-22), the treaty language plainly does not distinguish between the Yakama and other citizens in the use of public highways.

The determination of the court of appeals that this treaty contains no express exemption from federal taxes (Pet. App. 10a-11a) is a correct application of the plain text of the treaty and of this Court's repeated admonition that federal tax exemptions for Indians, as for all others, must be clearly and definitely expressed. This application of settled principles of law to the particular facts of this case creates no conflict and does not warrant review by this Court.

2. Contrary to petitioner's claim (Pet. 14-22), the decision in this case does not conflict with the several decisions of this Court that have applied the phrase "in common with" in addressing the scope of Indian fishing rights under this same treaty. *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Tulee* v. *Washington*, 315 U.S. 681 (1942); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919); *United States* v. *Winans*, 198 U.S. 371 (1905). In the fishing rights cases, the Court construed the phrase "in common with" as it appears in Article 3, paragraph 2, of the 1855 treaty. That paragraph provides in pertinent part that

> [t]he exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to [the Yakamas], as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory * * * .

12 Stat. 953. These "fishing rights cases have not found the 'in common with' language to *support* the conclusion

that Indians may exercise treaty rights without paying generally applicable fees;" instead, they "held that the Yakama Indians have special fishing rights 'despite' the phrase 'in common with.'" *Cree* v. *Waterbury*, 78 F.3d 1400, 1403 (9th Cir. 1996). See *Tulee* v. *Washington*, 315 U.S. at 684 (it was "*despite* the phrase 'in common with citizens of the Territory,'" that the Court held that the treaty conferred upon the Yakimas certain "rights beyond those which other citizens may enjoy") (emphasis added).[5]

Indeed, the fishing rights cases cited by petitioner support the conclusion of the court in this case that the "in common with" language in this treaty does not esta-

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[5] The treaty secured two distinct fishing rights to the Yakamas: an "exclusive" right to take fish in streams on or bordering the reservation; and a "right of taking fish at all usual and accustomed places" off the reservation "in common with citizens of the United States." Pet. App. 38a. In this context, this Court concluded that the phrase "in common with" confirmed that the "right of taking fish at all usual and accustomed places" was not an exclusive right. *Winans*, 198 U.S. at 382. Because the treaty secured a "right of taking fish," the Court held in *Winans* that the Yakama could not "be absolutely excluded" from the "usual and accustomed places" by the maintenance of a fishing wheel on the north side of the Columbia River under license from the state. *Id.* at 382, 384. Applying this holding of *Winans*, the Court further held in *Seufert Bros.*, 249 U.S. at 198-199, that the Yakamas could not be confined to the north side of the river and, in *Tulee*, 315 U.S. at 684-685, that the State could not impose a fishing license fee that "act[ed] upon the Indians as a charge for exercising the very right their ancestors intended to reserve." Finally, in *Washington State*, 443 U.S. at 679-686, the Court held that the Yakamas had "a right * * * to take a fair share of the available fish" in proportion to their "reasonable livelihood needs," rather than "merely the 'opportunity' to try to catch * * * some of the large quantities of fish that will almost certainly be available at a given place at a given time."

blish an exemption of the Yakamas from the generally applicable federal tax obligations imposed on other citizens. These cases established that the treaty right to take fish "in common with" citizens of the United States did not establish an unrestricted right. See *Oregon Department of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 765 n.16 (1980) ("We have not previously found * * * absolute freedom from state regulation on nonreservation lands, even in the face of Indian cession agreements that expressly reserved a right to hunt or fish on ceded nonreservation lands."). In *Winans*, 198 U.S. at 384, the Court observed that the treaty right of "taking fish at all usual and accustomed places" did not "restrain the State unreasonably, if at all, in the regulation of the right" but "only fixe[d] in the land such easements as enable the right to be exercised."[6] And, in formulating "an equitable measure of the common right [to take fish]" in *Washington State*, the Court observed that "an equal division * * * is suggested, if not necessarily dictated, by the word 'common' as it appears in the treaties." 443 U.S. at 686 n.27. In this case, however, instead of

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[6] In *Tulee*, 315 U.S. at 684, the Court held that the 1855 Treaty "le[ft] the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish." The Court concluded that this conservation power did not authorize "the state * * * to charge the Yakimas a fee for fishing." *Id.* at 685. See *Antoine* v. *Washington*, 420 U.S. 194, 207 (1975) ("the State must demonstrate that its regulation [of fishing rights] is a reasonable and necessary conservation measure"). The authority of Congress to regulate Indian affairs, however, is not so limited. Congress, unlike the States, has plenary authority to impose taxes and to regulate affairs with Indian nations. Pet. App. 7a (citing cases).

seeking an "equal" or "common" right, petitioner claims (Pet. 8) that he possesses an "unrestricted right" and an exemption from taxes that is enjoyed by no one else. Nothing in the text of this treaty provides support for that claim. See also note 4, *supra*.

3. a. Petitioner also errs in asserting (Pet. 13) that the decision in this case conflicts with decisions of this Court that have applied the Indian canon of construction in the fishing rights cases under this same treaty. Under that canon of construction, this Court has stated that ambiguous provisions in an Indian treaty are to resolved in favor of Indian interests. See, *e.g.*, *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 247-248 (1985); *Jones* v. *Meehan*, 175 U.S. 1, 11-12 (1899); *Choctaw Nation* v. *United States*, 119 U.S. 1, 27-28 (1886). In *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 353 & n.16 (1945), however, the Court explained that its application of this canon of interpretation in the fishing rights cases "meant no more than that the language [of a treaty] should be construed in accordance with the tenor of the treaty." The Court emphasized that it "stop[s] short of varying [treaty] terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress." *Id.* at 353.

Moreover, as the court of appeals explained in this case, the established requirement that there be "express exemptive" language for a tax exemption to be found in a statute or treaty is not inconsistent with the Indian canon of interpretation. Pet. App. 8a-9a. The court noted that the Indian canon continues to play an important role in evaluating such tax exemption claims (*id.* at 8a) (emphasis added):

> The applicability of a federal tax to Indians depends on whether express exemptive language exists within the text of the statute or treaty. *The language need not explicitly state that Indians are exempt from the specific tax at issue; it must only provide evidence of the federal government's intent to exempt Indians from taxation.* Treaty language such as "free from incumbrance," "free from taxation," and "free from fees," are but some examples of express exemptive language required to find Indians exempt from tax.
>
> Only *if express exemptive language is found in the text of the statute or treaty* should the court determine if the exemption applies to the tax at issue. *At that point, any ambiguities as to whether the exemptive language applies to the tax at issue should be construed in favor of the Indians.* * * * Only if such language exists, do we consider whether it could be "reasonably construed" to support the claimed exemption.

Applying this proper standard, the court of appeals correctly concluded that no language in the 1855 treaty shows an "intent to exempt Indians from taxation" in the use of public highways. *Id.* at 8a, 10a.

Even in cases in which the Indian canon applies, the principle that treaties are to be construed liberally in favor of Indians requires only that reasonable, not artificial, ambiguities be resolved in the Indians' favor. *South Carolina* v. *Catawba Indian Tribe*, 476 U.S. 498, 506 (1986). As this Court stated in *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 432 (1943), "even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the par-

ties." Since the court of appeals properly concluded that the "clear terms" of the treaty establish no basis for the claimed tax exemption, the Indian canon has no application to this case.

Petitioner acknowledges this fact indirectly by not addressing the actual language of the treaty but instead reordering and rewriting that language in an effort to create ambiguity where none exists. See page 8, *supra*. The *actual* language of Article 3, paragraph 1, is not ambiguous in providing the Yakamas with "the right, in common with the citizens of the United States, to travel upon all public highways." That language plainly does not expressly establish any tax exemption whatsoever. And, as this Court has made clear, the Indian canon may not be invoked to create ambiguities and "does not permit reliance on ambiguities that do not exist." *South Carolina* v. *Catawba Indian Tribe*, 476 U.S. at 506-507.

b. Petitioner's reliance on *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912), in this context is misplaced for two reasons. In the first place, there was no dispute in *Choate* that the statute on which the Indians relied contained an express tax exemption; the issue in *Choate* was instead whether that express tax exemption conferred a property right protected by the Fifth Amendment. *Id.* at 671. Secondly, that case involved the permissible scope of *state* taxation (*id.* at 678-679) and therefore implicated the established rule that "the States may tax Indians only when Congress has manifested clearly its consent to such taxation." *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 766 (1985). See *Oklahoma Tax Commission* v. *Chickasaw Nation*, 515 U.S. 450, 458 (1995); *Choate* v. *Trapp*, 224 U.S. at 675; Pet. App. 7a. By contrast, it is clear that generally applicable federal tax laws apply to Indians as to all other citizens and that any exemption for Indians from a federal tax "must be

definitely expressed." *Five Civilized Tribes*, 295 U.S. at 419-420.

Petitioner similarly errs in relying (Pet. 24-25) on *Squire* v. *Capoeman* in this context. In that case, the Court considered whether the General Allotment Act of 1887, Ch. 119, 24 Stat. 388, exempted an Indian from federal income tax on the sale of timber from land allotted to him but held in trust by the government. 351 U.S. at 2. The Court began its analysis in *Squire* by reiterating the general rule that "to be valid, exemptions to tax laws should be clearly expressed." *Id.* at 6. The Court noted that, under the General Allotment Act, when the trust was discharged, the allottee was to receive fee title to his land "free of all charge or incumbrance whatsoever." *Id.* at 3. While recognizing that this statutory text was not "expressly couched in terms of nontaxability," the Court said that, under the Indian canon of construction, "the general words 'charge or incumbrance' might well be sufficient to include taxation." *Id.* at 6-7. The Court then further noted that, in an amendment to this Act, Congress had specified that, when the patent in fee simple for the land was issued to allottees, "all restrictions as to sale, incumbrance, *or taxation* of said land" were to be removed. *Id.* at 7 (emphasis added). The Court concluded that the "literal language" of this amendment "evince[d] a congressional intent to subject an Indian allotment to all taxes only *after* a patent in fee is issued to the allottee," which supported the conclusion that the allotment was exempt from taxes *before* the patent was issued. *Id.* at 8 (emphasis added).

The federal tax exemption found in *Squire* was thus plainly grounded in the "literal language" of the statute that expressly described the "restrictions" on "taxation of [allotted] land." 351 U.S. at 7-8. The decision of the

court of appeals in this case applies the same principles articulated in *Squire*. The court looked first to the "literal language" (351 U.S. at 8) of the treaty to determine whether an exemption from the tax laws had been "clearly expressed" (*id.* at 6). Pet. App. 10a-11a. Finding no clear expression of an intent to create a tax exemption in the language of the 1855 treaty, the court correctly held that the Indian canon has no application in determining the scope of an exemption from federal taxation that does not exist in the text of the treaty. Pet. App. 8a; page 9, *supra*.

c. In any event, canons of interpretation "are not mandatory rules." *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001). They "need not be conclusive and are often countered, of course, by some [other] maxim pointing in a different direction." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 115 (2001). When this Court was recently asked to consider the concurrent application of the Indian and federal tax canons in *Chickasaw Nation*, it declined to say that "the pro-Indian canon is inevitably stronger" than the principle that exemptions to tax laws must be "clearly expressed." 534 U.S. at 95.[7] As the Court stated in *Chickasaw*, the "earlier cases are too individualized, involving too many different kinds of legal circumstances, to warrant any such assessment about the two canons' relative strength." *Ibid.*

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[7] The question before the Court in *Chickasaw Nation* was whether the Indian Gaming and Regulatory Act, 25 U.S.C. 2702 *et seq.*, exempted Indian tribes from federal wagering and occupational taxes. The Tenth Circuit held that no such exemption was provided by the terms of the statute and that the tribes were therefore subject to these taxes. 208 F.3d 871 (10th Cir. 2000). This Court agreed with that holding and found the Indian canon inapplicable in doing so. 534 U.S. at 93-95.

Moreover, none of these "earlier cases" cited in *Chickasaw* justifies petitioner's reliance on the Indian canon in this case. In each of the cited cases, the Court properly looked first to the actual language of the treaty or statute to determine whether it contained an express statement of exemptive intent. In *Choate*, the Court found that the language "nontaxable" was clearly exemptive (224 U.S. at 675-676); in *Squire*, the Court found the language "free of all charge or encumbrance whatsoever" to be exemptive (351 U.S. at 3); in *Choteau*, the Court found that a statute imposing tax on income "from any source whatever" was *not* expressly exemptive (283 U.S. at 693-694); and in *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), the Court held that a statute that "[o]n its face * * * exempts land and rights in land" did not exempt income derived from the use of land (*id.* at 155-156). As the court of appeals emphasized in this case, the 1855 treaty contains no language such as "'free from incumbrance,' 'free from taxation,' and 'free from fees,'" which are "examples of express exemptive language" that would be sufficient to warrant an exemption. Pet. App. 8a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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